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September 6, 2016

**Via ECFS**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *Ex Parte* Filing of the American Cable Association on Expanding  
Consumers' Video Navigation Choices, MB Docket No. 16-42, and  
Commercial Availability of Navigation Devices, CS Docket No. 97-80**

Dear Ms. Dortch:

On September 1, 2016, Matthew Polka and Ross Lieberman, American Cable Association ("ACA"), Robert Gessner, President, MCTV, and Chairman, ACA, Steven Cochran, CEO, Wide Open West ("WOW!"), and Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, met with Gigi Sohn, Counselor to Chairman Wheeler, and Jessica Almond, Legal Advisor, Media, Public Safety, and Enforcement to Chairman Wheeler, and separately with Commissioner Rosenworcel and her Legal Advisor, Marc Paul.

The purpose of the meetings was to discuss how implementation of the Commission's initial proposal, the NCTA/AT&T "Apps" proposal, or any proposal derivative of either would unduly burden smaller multichannel video programming distributors ("MVPDs") and how the Commission should address this problem. As ACA explained in recent meetings with Commission staff, smaller MVPDs would incur substantial costs and face major operational challenges to simulcast their existing video service in Internet Protocol ("IP") through adaptive bitrate multicast or unicast streams ("all-IP"), which is a *de facto* prerequisite to implementing any of these navigation device proposals.<sup>1</sup> Consequently, to date, ACA has submitted that none of these proposed navigation device rules should apply to MVPDs with 1 million or fewer

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<sup>1</sup> See Letter from Thomas Cohen, Counsel to ACA, to Marlene Dortch, Secretary, FCC, MB Docket No. 16-42 *et al.* (Aug. 25, 2016) ("ACA Navigation Device *Ex Parte*").

Marlene H. Dortch  
September 6, 2016  
Page Two

subscribers. With the Commission approaching a decision in the above-referenced proceedings, ACA herein amends its proposal and urges the Commission in adopting new navigation device rules to provide the following relief for smaller MVPDs, which, as explained below, is within the Commission's statutory authority.

**ACA'S AMENDED PROPOSAL FOR RELIEVING MVPDS WITH 1 MILLION OR FEWER SUBSCRIBERS FROM THE BURDENS OF NEW NAVIGATION DEVICE RULES**

- The CableCARD consumer support rules set forth in Section 76.1205(b) shall continue to apply to all MVPDs with 1 million or fewer subscribers as of the effective date of the Order that were subject to such rules as of January 14, 2013.<sup>2</sup>
- The new navigation device rules shall apply to MVPDs with more than 400,000 subscribers and fewer than 1 million subscribers as of the effective date of the Order, but the compliance date for such MVPDs shall not begin until three years after the date that MVPDs with more than 1 million subscribers shall comply with the new rules.<sup>3</sup>

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<sup>2</sup> Section 76.1205(b) applies by its terms to "a multichannel video programming provider that is subject to the requirements of § 76.640." *See Implementation of Section 304 of the Telecommunications Act of 1996 et al.*, CS Docket No. 97-80 et al., Order on Reconsideration, FCC 11-7 (2011). Section 76.640, requiring support for unidirectional digital cable products on digital cable systems, was repealed in *EchoStar v. FCC*. *See EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013). Notwithstanding, ACA's intent here is to place only those MVPDs with 1 million or fewer subscribers that were subject to the CableCARD support rules prior to *EchoStar* under a continuing obligation to comply with them.

<sup>3</sup> Given the financial and operational challenges of implementing these rules on MVPDs with more than 400,000 and fewer than 1 million subscribers, the Commission shall entertain individual requests from such MVPDs for a limited extension of time to comply, if a requesting operator can demonstrate that it attempted in good faith to comply with the new rules by the extended deadline, but that it could not feasibly do so. Such a showing must include a detailed factual statement describing the steps the operator has taken to comply with the new rule's requirements, an estimate of how long it will take the operator to comply, supported by appropriate documentation, and a corroborating affidavit by an officer or director of the operator, pursuant to Section 1.16 of the rules, 47 C.F.R. § 1.16. The Media Bureau shall be delegated authority to consider such requests.

This waiver process for individual requests for a limited extension of time to comply is based upon a similar waiver process that the Commission has made available to operators with more than 400,000 subscribers and fewer than 2 million subscribers concerning compliance with obligations contained in a 2013 Report and Order in which the Commission adopted accessibility rules for "digital apparatus and navigation devices used to view video programming." *See Accessibility of User Interfaces, and Video*

Marlene H. Dortch  
September 6, 2016  
Page Three

- The new navigation device rules shall not apply to MVPDs with 400,000 or fewer subscribers as of the effective date of the Order.<sup>4</sup>

### Rationale for Amended Proposal

ACA's amended proposal for relief for smaller MVPDs has two major underpinnings. First, for smaller MVPDs, which serve only about seven percent of pay-TV customers, the pay-TV business model is increasingly tenuous with small and eroding margins and declining subscriber counts. Given these realities, most smaller MVPDs are unable or reluctant to make sizeable financial and operational investments in their pay-TV service. Instead, many of these providers compete in the pay-TV business by, for example, providing excellent customer service and not requiring long-term contractual commitments or credit requirements.<sup>5</sup> Additionally, many smaller MVPDs continue to offer basic and expanded basic programming via "Clear QAM," which enables customers to receive such programming on televisions with built-in QAM tuners without leasing a set top box. Instead of investing significant resources in their pay-TV service, these providers are investing largely in broadband service, which especially benefits subscribers that consume video from over-the-top ("OTT") providers. In addition, to enhance the overall video experience, an increasing number of smaller MVPDs are deploying advanced set top boxes with cutting edge user interfaces (e.g. TiVo) that enable subscribers to access and have integrated search of OTT and pay-TV content.

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*Programming Guides and Menus; Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket Nos. 12-108, 12-107, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330, 17403-404, ¶ 117, n.469 (2013) ("CVAA User Interfaces R&O").

<sup>4</sup> Not applying new rules to MVPDs with 400,000 or fewer subscribers is based upon on the Commission's definition of "small" cable company in 47 C.F.R. § 76.901(e). ACA does not believe it is appropriate to exclude any MVPD that satisfies this subscriber threshold from benefiting from this relief based on its affiliation with another entity. Under ACA's proposal, the new rules would apply to the top 11 MVPDs.

<sup>5</sup> See, e.g., Letter from Lisa W. Epperley, General Manager, Giles-Craig Communications Inc., to Chairman Tom Wheeler *et al.*, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 2, 2016) ("Our customers appreciate receiving video service from us because our offerings and customer service meets their needs. For instance, we continue to offer some of our programming in an unencrypted format that allows our customers to subscriber to service that does not require leasing of a set top box. Giles-Craig Communications, Inc. offers its programming with choice to the service packages, low pricing, quality customer/technical service, no commitment... [and serves] a larger community of older customers meeting the needs not available from other competitors.").

Marlene H. Dortch  
September 6, 2016  
Page Four

Second, because the costs to implement any of the new navigation device rules under consideration would be so disproportionately great for smaller MVPDs, if forced to comply, these providers will suffer significant harm to their business and their subscribers. The costs are significant because any of the new rules under consideration will effectively require MVPDs to simulcast their video services in all-IP;<sup>6</sup> yet, very few smaller MVPDs have the available network capacity or necessary transmission equipment to offer an all-IP video service in tandem with their current digital video services over the same network. Should they be required to comply with any new rules, smaller MVPDs would face substantial financial and operational challenges as a result of the need to free-up bandwidth and purchase and install all-IP transmission equipment. In the *ACA Navigation Device Ex Parte*, ACA provided hypothetical case studies for various types of smaller MVPDs to offer an all-IP simulcast that indicated that only MVPDs with 1 million or more subscribers have the ability to make this transition within two years in an economically viable manner. Many small MVPDs could not absorb these costs

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<sup>6</sup> Given that no cable operator with 1 million or more subscribers has objected to complying with the NCTA/ACA “Apps” proposal, which would require a cable operator to offer service in all-IP within two years, it is safe to assume that these providers would satisfy any new navigation device rules, including the Commission’s initial proposal, by offering their service in all-IP. Because only these large MVPDs have the scale to research and develop new technical solutions, alternative solutions for satisfying any new navigation solution for cable operators, such as a QAM/all-IP gateway solution, will not materialize for use by smaller MVPDs. In its Basic Tier Encryption Order, the Commission recognized that the largest MVPDs have the resources to develop IP-compatible technical solutions that can later be adopted for use by smaller MVPDs. *Basic Service Tier Encryption et al.*, MB Docket No. 11-169 et al., Report and Order, 27 FCC Rcd 12786, 12802, ¶ 21 (2012) (“[L]arge cable operators generally dictate equipment features to manufacturers and commonly get priority in delivery of that equipment. We anticipate that the large operators’ demand for this equipment eventually will lead all equipment to include this functionality in the marketplace, and thus the equipment small cable operators provide will eventually include the IP functionality as well, regardless whether they specify this particular feature.”).

Marlene H. Dortch  
September 6, 2016  
Page Five

and would go out of business or cease offering video service,<sup>7</sup> and others would be forced to divert planned investments in broadband.<sup>8</sup>

In determining whether and when to transition to an all-IP simulcast, MVPDs need to consider multiple factors. In other words, having a certain number of subscribers is not the sole driver of an MPVD's decision. For instance, costs to transition will be lower if an MVPD has systems in close proximity so that headends can be more readily interconnected and if an MVPD operates in one or two television broadcast markets so it does not have to transcode many broadcast streams. Yet, ACA acknowledges that the Commission needs to adopt rules that are administrable and do not depend on the unique attributes of each of the many hundreds of smaller MVPDs. Moreover, ACA acknowledges that as a general matter smaller MVPDs with greater scale are more likely to transition to simulcasting in all-IP in the long run. In fact, during the meetings with Commission staff, Mr. Cochran of WOW! stated that he believed his company would likely offer its video service in all-IP within five years. At the same time, both Mr. Cochran and Mr. Gessner emphasized that smaller MPVDs without the scale of a WOW! were in a far different position and see no economically viable path for offering an all-IP simulcast at this time, but they acknowledged one could develop although not for some time. ACA's amended proposal for small provider relief is based on these factual distinctions, and ACA urges its adoption. The Commission should expect that new navigation device rules, assuming they are properly designed and applied only to larger MVPDs, will likely result over time in financially

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<sup>7</sup> See e.g., Letter from Robert K. Johnson, CEO, Dickey Rural Service, Inc. to Chairman Tom Wheeler *et al.*, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 2, 2016) ("Given this daunting business environment, our company cannot afford the additional regulatory costs of the proposed Navigation Device rules, estimated to be at least \$1 million per system, or any other proposals that require such substantial costs...Should the Commission mandate that smaller providers spend this much money to comply with such rules, we would be forced to cease offering video service. This outcome is certain even if the deadline for compliance is delayed because any solutions that the industry will, if ever, develop for smaller MVPDs are still going to be affordable for a company of our size.").

<sup>8</sup> See e.g., Letter from Robert M. Wieand, Controller, Service Electric Cablevision, Inc. to Chairman Tom Wheeler *et al.*, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Aug. 26, 2016) ("Because the Commission's navigation device proposal is estimated to cost at least \$1 million per system, our company cannot afford to comply with this proposal or any other proposal that incurs such substantial cost. Should the Commission mandate that small providers comply with such rules, we would be forced to divert resources from upgrading our broadband networks which are necessary to meet our customers' increasing demands for greater speeds.").

Marlene H. Dortch  
September 6, 2016  
Page Six

and operationally sound solutions that could be adopted by an increased number of smaller MVPDs.<sup>9</sup>

### **Statutory Authority to Adopt a Rule of Limited Application**

As ACA has explained in its comments, while Section 629 of the Communications Act, as amended, by its terms applies to all MVPDs, the Commission has recognized that its implementing regulations need not apply universally to all MVPDs to achieve statutory goals.<sup>10</sup> Although the Commission could adopt a rule pursuant to Section 629 that is applicable to all MVPDs, together with an exemption for smaller MVPDs under the limit suggested above, adopting a rule of limited applicability is both consistent with precedent and preferable from legal perspective. Unlike some other statutes, Section 629 does not include an express delegation of authority to the Commission to exempt providers under a certain size from its implementing regulations. This omission, while understandable given the flexible nature of Congress charge to the Commission under Section 629 to ensure a competitive marketplace for navigation devices, could leave any exemption adopted subject to legal challenge in the courts. To preempt this possibility, the better course of action is to follow its own precedents and simply state in the rule that it “shall not apply” with respect to MVPDs under a set subscriber limit.

In its initial orders implementing the integration ban (the “Plug & Play Orders”), the Commission declined to apply the ban to direct broadcast satellite (“DBS”) providers.<sup>11</sup> The

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<sup>9</sup> Smaller providers not covered by new navigation rules would welcome the Commission’s assistance in reducing MVPD-related costs, including the significant costs associated with leasing set top boxes. These MVPDs are not opposed to delivering their services over third party devices under the right circumstances to avoid the significant capital and operational costs of leasing devices, on which many receive little or no return. Furthermore, many smaller MVPDs request the Commission’s assistance in obtaining rights to include the apps of OTT providers on their advanced set top boxes and otherwise obtain the same rights to offer TV Everywhere and OTT services as larger MVPDs. As ACA member Atlantic Broadband has explained in a declaration filed with the Commission, “Despite our Netflix relationship, we have only been permitted to offer integrated access to their content on customers’ TV screens and not on other devices. We also have run into barriers with other online video distributors to obtain full and unfettered access to their content.” See Declaration of David Isenberg, President and Chief Revenue Officer for Atlantic Broadband, Comments of American Cable Association, MB Docket No. 16-42, CS Docket No. 97-80 (Apr. 22, 2016) (“ACA Comments”).

<sup>10</sup> ACA Comments at 90-102.

<sup>11</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775 (1998) (“First Plug and Play Order”); *Implementation of Section 304 of the*

Marlene H. Dortch  
September 6, 2016  
Page Seven

Commission’s reasoning for the carve-out for DBS is instructive and bears directly on the question of relief for smaller providers from the proposed rules:

There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language does not include all multichannel video programming systems. Our reading of the law is that consumer choice in navigation devices for all multichannel video programming systems was mandated by Congress when it enacted Section 629. Our decision and rules, however, recognize the differences between various providers and, as discussed below, the rules are intended to recognize the fact that DBS reception equipment is already nationally portable and commercially available.<sup>12</sup>

The Commission found marketplace mechanisms sufficient to ensure the commercial availability of navigation devices without imposing the Plug and Play rules on DBS, whose subscribership at the time “constitute[d] only 8% of the MVPD market, as compared to 87% of the MVPD market for cable.”<sup>13</sup> The regulation adopted effectuated this conclusion by specifying that the prohibition on placing into service navigation devices containing conditional access and other functions in a single integrated device “shall not apply” with respect to MVPDs that support subscriber use of navigation devices purchased at retail from vendors unaffiliated with the MVPD.<sup>14</sup>

One year later, the Commission employed similar reasoning when it exempted operators using devices employing only an analog conditional access mechanism. It found that only the retail development of hybrid analog-digital and digital navigation devices would hasten the roll-out of digital services by MVPDs and bring consumers the associated technological advances.<sup>15</sup>

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*Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (“Second Plug and Play Order”).

<sup>12</sup> See *First Plug and Play Order*, ¶ 22.

<sup>13</sup> *Id.*, ¶ 65.

<sup>14</sup> 47 C.F.R. § 76.1204(a)(2)(ii)(A) & (B).

<sup>15</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, Order on Reconsideration, 14 FCC Rcd 7596, ¶ 13 (1999) (“First Plug & Play Reconsideration Order”). The Commission found application to analog devices unnecessary for several legal and practical reasons: (i) the “confluence” of industry participants necessary to create competitive navigation devices was unlikely to take place in the analog environment and forcing it to do so would “have

Marlene H. Dortch  
September 6, 2016  
Page Eight

Section 76.1204 of the Commission's rules was subsequently amended to add subsection (f), which provided that the integration ban "*shall not apply* to the provision of any navigation device" employing conditional access only to access analog video programming capable of accessing only analog video offered over a multichannel video distribution system that does not provide access to any digital transmissions.<sup>16</sup> At the same time, the Commission reaffirmed its decision not to apply the rules to DBS providers, explicitly rejecting the argument that Section 629(a) requires uniform regulations across all multichannel video service platforms.<sup>17</sup>

The Plug & Play Orders reflect the Commission's understanding that, although Section 629 applies to all MVPDs, requiring universal compliance with each and every one of the Commission's implementing regulations was unnecessary to foster the commercial availability of navigation devices. Rather, the Commission found it could better accomplish its larger policy objectives by judiciously limiting application of its regulations implementing Section 629 to only those industry members where they were necessary to achieve commercial availability and the benefits of applying them outweighed the costs. Where, as here, the technical mandates associated with the Commission's proposed rules will be enormously and disproportionately burdensome to smaller MVPDs (necessitating numerous and costly waiver requests) and the corresponding public benefits minimal, the Commission would be fully justified in limiting their scope from the outset.

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an adverse impact with respect to digital equipment;" (ii) manufacturers were unlikely to produce non-integrated analog equipment due to low demand; (iii) the development of an analog security module "is not economically feasible;" (iv) application of the integration ban to analog devices would result in unnecessary expenditures by MVPDs for a module that would soon be obsolete; and (v) that it "would not be advisable for the Commission to apply a rule in a manner which could interfere with the development of competition in the digital marketplace."

<sup>16</sup> 47 C.F.R. § 76.1204(f) (emphasis added).

<sup>17</sup> *First Plug & Play Reconsideration Order*, ¶ 37 ("The statute mandates the outcome of competitive availability, not uniform means to achieve this result.").



**KELLEY DRYE & WARREN LLP**

Marlene H. Dortch  
September 6, 2016  
Page Nine

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,



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